

NAVIGATING ETHICAL PITFALLS AS A GOVERNMENT ATTORNEY

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RULE 4.2

- In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law or a court order.

WHY RULE 4.2?

- This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against:
 - possible overreaching by other lawyers who are participating in the matter;
 - interference by those lawyers with the client-lawyer relationship;
 - and the uncounseled disclosure of information relating to the representation.

Indiana Rules of Professional Conduct,
Rule 4.2, Comment 1.

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- Remember, a “person” is not necessarily a “party.”

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HOW DO YOU KNOW THE PERSON IS REPRESENTED?

- Rule 4.2 requires actual knowledge the person is represented, however, this may be inferred from the circumstances.
- The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

**Indiana Rules of Professional Conduct, Rule
4.2, Comment 1.**

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WHAT'S A "MATTER"?

- A "Matter" arises whenever there appears to be an adversarial relationship between the attorney's client and the represented party.



SOME COURTS SAY . . .

- **Some courts take a very narrow view of what a “matter” is:**
 - **No bar to federal agents questioning party represented on an unrelated state drug charge**
United States v. Masullo, 489 F.2d 217, 222-24 (2d Cir. 1973)

OTHERS SAY, . . .

- **Some courts, however, take a broader view:**
 - **Prosecutors erred in questioning a person in arson case who was represented on related fraud charges**

United States v. Hammad, 858 F.2d 834, 840 (2d Cir. 1988)

WHILE OTHERS SAY, . . .

- **At least one other court held that:**
 - **Prosecutors erred in speaking with a defendant charged with rape and robbery about unrelated drug activities**

In re Burrows, 629 P.2d 820, 824-25 (Or. 1981)

QUESTIONS FOR DISCUSSION

- Is a person that is going through a divorce “represented” for the purpose of your investigation?
- Is a person with a separate criminal case “represented by another lawyer in the matter”?

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JUST BECAUSE IT IS NOT YOU, . .

- **If you can't speak with the person, you can't have someone else do so.**
- **You can, however, advise a client, but can't mastermind his/her conversation with another.**
- **You possibly can use information from another who spoke with the person independently.**



Who Can Consent?

RULE 4.2

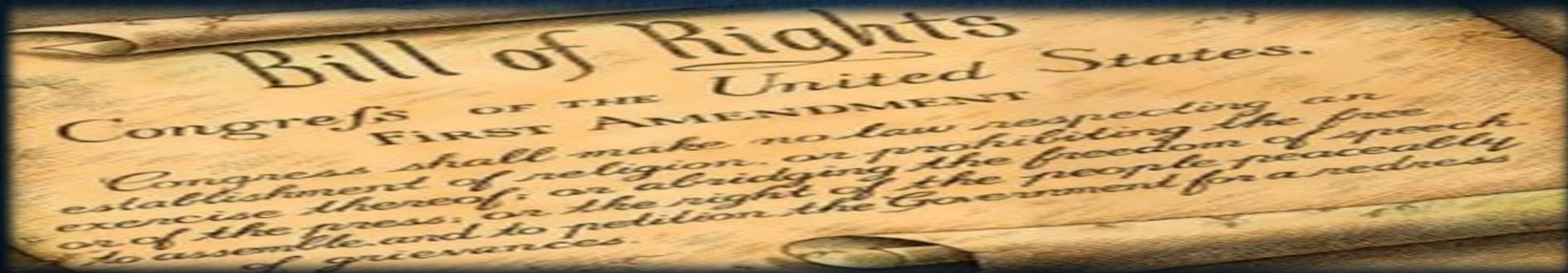
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REPRESENTED GOVERNMENT ENTITIES AND OFFICIALS

- What happens if opposing counsel (or an opposing party) goes around you to speak with someone in your agency about your case or how you are handling it?

HOWEVER, . . .

- The ABA and others interpret the rule to accommodate:
 - the constitutional right to petition government,
 - a citizen's right of access to government decision makers, and
 - other communications authorized by law



IN SHORT, . . .

- **Rule 4.2 permits an attorney representing a private party in a controversy with the government to communicate about the matter with government officials who:**
 - **have authority to take or to recommend action in the matter,**
 - **provided that the sole purpose of the attorney's communication is to address a policy issue, including settling a controversy**

**ABA Comm. on Ethics & Prof'l Responsibility,
Formal Op. 97-408 (1997)**

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- What if you just listened to the opposing party?

- What about covert operations?

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RULE 4.2

Indiana Comment 5:

Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

BUT WHAT ABOUT DISHONESTY?

Indiana Rule 8.4:

- It is professional misconduct for a lawyer to:
 - (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

ALLEN V. INTERNATIONAL TRUCK AND ENGINE, 2006 WL 2578896 (SD IND.)

- *Moreover, counsel should have known that improper conduct with named Plaintiffs was occurring given the number of attorneys who reviewed investigation-related documents and the frequency with which they reviewed investigation summaries. While the evidence does not establish that Defendant's counsel affirmatively directed the investigators to contact Defendant's employees, including named Plaintiffs, the Court simply cannot condone Defendant's ostrich-styled defense. Defendant's counsel's culpability is compounded by their failure to affirmatively advise, instruct or otherwise act to prevent contact with represented employees or to prevent contact with unrepresented employees under false pretenses.*

IN RE GATTI

In re Gatti, 8 P.3d 966 (Or. 2000)

applying DR 1-102(A)(4) (Model Code equivalent of Model Rule 8.4(c)).

Misrepresentation becomes fraud or deceit “when it is intended to be acted upon without being discovered.”

BUT OTHER COURTS

Have held that it is okay:

Gidatex v. Campaniello Imports, Ltd., 82 F.Supp. 2d 119
(S.D.N.Y. 1999)

Miano v. A.C.&R. Advertising, Inc., 148 F.R.D. 68 (S.D.N.Y.
1993)

Apple Corps v. International Collectors Society, 15 F.Supp.2d
456 (D.N.J. 1998)

Indiana Rule of Professional Conduct 3.6

Trial Publicity

(a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter.

(b) Notwithstanding paragraph (a), a lawyer may state:

(1) the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved;

(2) information contained in a public record;

(3) that an investigation of a matter is in progress;

(4) the scheduling or result of any step in litigation;

(5) a request for assistance in obtaining evidence and information necessary thereto;

(6) a warning of danger concerning the behavior of a person involved, when there is reason to believe that there exists the likelihood of substantial harm to an individual or to the public interest; and

(7) in a criminal case, in addition to subparagraphs (1) through (6):

(i) the identity, residence, occupation and family status of the accused;

(ii) if the accused has not been apprehended, information necessary to aid in apprehension of that person;

(iii) the fact, time and place of arrest; and

(iv) the identity of investigating and arresting officers or agencies and the length of the investigation.

(c) Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client. A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.

(e) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-107(G)

A lawyer or law firm associated with a civil action shall not during its investigation or litigation make or participate in making an extrajudicial statement, other than a quotation from or reference to public records, that a reasonable person would expect to be disseminated by means of public communication that relates to:

- (1) Evidence regarding the occurrence or transaction involved.
- (2) The character, credibility, or criminal record of a party, witness, or prospective witness.
- (3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.
- (4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.
- (5) Any other matter reasonably likely to interfere with a fair trial of the action.

PUBLIC RECORD

In re Brizzi, 2012, 962 N.E.2d 1240

- To receive the protection of safe harbor of disciplinary rule allowing attorney to make extra-judicial statement about information contained in a public record, a lawyer may not provide information beyond quotations from or references to the contents of the public record.
- Under safe harbor of disciplinary rule allowing attorney to make extra-judicial statement about information contained in a public record, a prosecutor must make clear that what is being disclosed is, in fact, the contents of the probable cause affidavit or other identified public document so the statements cannot be misunderstood to be the prosecutor's own opinion about the evidence or the suspect's guilt.

PREJUDICE

In re Brizzi, 2012, 962 N.E.2d 1240

- Attorney engaged in misconduct by making public statements as a prosecutor that had substantial likelihood of materially prejudicing adjudicative proceedings and substantial likelihood of heightening public condemnation of criminal defendants; press release did not include required explanation that a charge was merely an accusation and that defendant was presumed innocent until proven guilty, and much of the undisputed statements prosecutor made in press release were of the type rebuttably presumed to have substantial likelihood of materially prejudicing adjudicative proceeding.
- In considering the propriety of a prosecutor's extra-judicial statement, the court determines the likelihood that a particular statement will cause prejudice at the time made, not whether, in hindsight, it actually worked to the detriment of a defendant.

HANDLING MEDIA REQUESTS

- What is the agency protocol?
- An attorney may be held accountable for what is said by the press office.
- Is it even necessary to speak about a specific case?



OTHER THINGS TO CONSIDER . . .



- What does it mean to represent “the State.”
- Does public policy dictate that we make decisions based upon less than complete information?
- Should we be held to higher standards?

THANK YOU FOR YOUR TIME

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